

Balbindra Singh Joga Singh Vs. the Union of India

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Court : Mumbai

Decided On : Jul-13-1989

Reported in : AIR1989Bom401; 1990(2)BomCR544; (1989)91BOMLR577

Judge : Sharad Manohar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 33 - Rules 3 and 5; [Limitation Act, 1963](#) - Sections 3(2) and 14

Appeal No. : First Appeal No. 108 of 1976

Appellant : Balbindra Singh Joga Singh

Respondent : The Union of India

Advocate for Def. : S.G. Mandrekar, Adv.

Advocate for Pet/Ap. : R.V. Mohile, Adv.

Judgement :

1. What the Appeal is about This is the Plaintiff's Appeal . He was the owner of a Truck. While crossing the level crossing of a Taloja, an engine of the Railway Knocked down the Truck and broke it into pieces. The plaintiff filed the suit for damages on the ground that the Railway Administration was Negligent in the matter of not locking the level crossing gate while the engine was moving on the rails. The suit was filed in form pauperis. The trial Court upheld his contention that

there did exist negligence on the part of the Railway Administration as alleged by the plaintiff. Major portion of damages pleaded by the plaintiff was held established. All the same, the suit was dismissed on the ground that it was barred by limitation.

In effect, the learned Judge has held that the presentation of the pauper petition on the last day of the date of limitation should have been by the petitioner himself, that the presentation of the same by his Advocate and his verification of the same about 5 days thereafter meant that the pauper petition itself was filed 5 days after the expiry of limitation. The suit has been dismissed on this narrow ground. Hence, this appeal.

As will be presently pointed out, the learned Judge's view regarding vindication of the Railway's negligence is quite correct having regard to the nature of the evidence adduced by the parties. However, in my opinion, his view regarding the question of limitation turns out to be very narrow and pedantic. In my opinion, the suit must be held to be within limitation.

2. Facts : undisputed & indisputable :

(A) At least at these stages there is no dispute that the plaintiff was the owner of the relevant Truck, B.M.Q. 2640, on the date of the accident in question. There is no dispute about the accident as well. On 7-6-1968 the truck was loaded with stacks of grass and was being driven from village Pethali to Thane, driven by the driver Gurmit Singh. It came near the Taloja Railway station. There is a Level Crossing Gate No. 10 at that station. The time was about 10-15 p.m. According to him, the gate of level crossing was open no prohibitory red light was shown anywhere, whether on the gate or elsewhere. The man to open the gate was nowhere on the horizon and thus there existed no indication whatsoever that any train or engine would be passing over the rail across the railway crossing. He and his cleaner were in the Truck at that time. The Truck was driven over the level crossing and was about to cross the down track. While doing so, the rear right side of the Truck was knocked down by the Railway Engine, which was being driven reverse towards Panvel. It broke the Truck literally into 2 pieces. Fortunately, both the driver and the cleaner escaped unhurt, but the truck was in shamble. The two

pieces of the truck were removed from the rail track by the Railway's crane on the next day. About 3 or 4 days thereafter, the two parts of the truck were loaded in another truck and carried away by the plaintiff to a garage, at Kalyan. The garage owner, however, made no bones of the fact that it was a total loss and it was futile attempting repairs of the truck, as it was, it was a second hand truck of old vintage. The last received knocking made a junk of it. The garage owner took out some serviceable parts of the truck and sold them as second hand spare parts and in this way the plaintiff could salvage Rs. 2000/- from out of the shambles.

There is no dispute at least at this stage that the Station Master, Mr. Pangare, made the necessary inquiry and submitted his Report to the Divisional Superintendent of Railways. In that Report, he specifically attributed the accident to the gross negligence of the pointsman on duty at that time, one Sagu Kushaba Jodhav. It is also an admitted fact (as is evident from the Station Master's own evidence) that in fact 2 years' increments of the pointment were stopped on account of his (Pointsmen) Act of gross negligence. Admittedly, the plaintiff gave notice dated 19-6-1968 to the Railway Administration claiming damages as mentioned in the instant plaint. A reply dated 22-4-1969 was given by the administration. The contents of the reply are set out in para 19 of the defendant's own written statement. This is what is averred therein:-

'a) The doors of the level-crossing gate No. 10-C were closed for road users at the time of accident.

b) The left wing of the closed gate was forcibly opened by the truck driver attempting to trespass the railway track disregarding the warning board and the red lamps which were burning at the gate indicating the closures of level crossing gate to road users.

c) The level-crossing gate was not manned as alleged.

d) There was no negligence or wrongful Act of the railway administration or its employees and the accident was entirely due to negligence and recklessness of the truck driver and therefore the applicant's claim is inadmissible.'

(B) A statutory notice under Section 80 of the Civil Procedure Code was given by the plaintiff on 3-6-1971 and a petition in forma pauperis was filed by the plaintiff on 5-8-1971. There is no dispute that the last date for filing the petition would be 6-8-1971, having regard to the statutory period of 60 days required for giving notice under Sec. 80 C.P.C That suit, unfortunately. Came to be filed in the Court at Thane. What this means is that the plaintiff was advised by his Advocate to file the suit in the Court at Thane. The learned Judge has blamed the plaintiff for having filed the suit in such a Court. I have to see whether the blame brought by the learned Judge to the door-step of the plaintiff is justified.

(C) The petition for leave to sue forma pauperis remained cooling its heels in the Court at Thane till 26-9-1972. On which date that Court realised that it had no territorial jurisdiction to entertain the suit. The plaint was ordered to be returned for presentation to the proper Court. the plaint was in fact withdrawn by the learned Advocate for the plaintiff on that every day and he filed it in the Court at Alibag, which was the appropriate Court having jurisdiction to entertain the suit on the very next day 27-9-72. There cannot be any dispute that if the petition is deemed to have been filed on that date validly, then there would be no question of any bar of limitation. But the plea raised on behalf of the defendant was that the suit was barred by limitation. The above mentioned pleas were also raised by the defendant, which are set out as part of para 19 of the written statement.

It is unnecessary to set out the other averments in the plaint or the written statement. All the facts set out above are stated in the plaint and the main defence of the defendant. Which is contained in para 19 of the written statement, is also out above. On these pleadings, issues were framed by the learned Judge and the parties went to trial.

As mentioned at the outset, the Court found no difficulty in upholding the plaintiff's claim, on merit, to the extent of Rs. 16,200/-, Rs. 12, 000/- being the market value of the truck on the date of the accident and Rs. 4200/- being the loss of income suffered by the plaintiff on account of the damage to the vehicle.

As regards limitation, however, the learned Judge vehicle.

(i) That there existed no bona fides or good faith on the part of the plaintiff when he filed the suit in a wrong Court on 5-8-1971. In this connection, the learned Judge has observed as follows:-

'He (the plaintiff) resides at Kalyan and was expected to know that Taloja, where the alleged accident took, did not come within the jurisdiction of Thane Court.'

this according to the learned Judge, was indicative of complete absence of due care and caution on the part of the plaintiff.

(ii) that no averment of good faith was made by the plaintiff while presenting the pauper petition to the Alibag Court. according to the learned Judge-

'It was necessary for the plaintiff to state how and when he was misled in presenting his petition in Thane Court on 5th August 1971. As this was exclusively within his own knowledge, the plaintiff was expected to make specific averment to that effect in his petition which was presented in the Court on 27th September 1972 and also to state about it in his evidence in Court.'

Failure on the part of the plaintiff to attend to any of the above requirements gave rise, in the learned Judge's opinion, to an inference that good faith was absent in this case in totality. The pauper petition was verified by the plaintiff as late as on 4th October 1972 . 9-1972, that, hence, 4-10-1972 was the date of presentation of the present petition, on which date, according to the learned Judge, the petition was hopelessly barred by limitation.

This suit was, therefore, dismissed by the learned Judge with costs.

3. Question urged in this Court by learned Advocates on both the sides: The plaintiff (appellant in this Court) unfortunately got next to no help from any of his Advocates in this Court. as many as three Advocates in this Court. As many as three Advocates have filed their appearance, but no help of whatsoever character was received from any Advocate, because all of them chose to remain absent on the relevant dates of hearing Mr. Mandrekar, the learned Counsel for the railway administration, however, helped me examining the entire evidence on both the sides. Mr. Mandrekar, while supporting the view taken by the learned Judge

relating to the position of limitation, questioned the correctness of the lower Court's finding on merit. As indicated above. I am, no inclined to accept the learned Judge's view relating to the expiration of limitation. But I find no justification whatsoever for interfering with his findings so far as the merits of the plaintiff's suit are concerned, very industrious and persuasive arguments of Mr. Mandrekar notwithstanding. I will give indication as to why I have not been able to accept his challenge to that part of the lower Court's finding. I will presently deal with the question of limitation, which is the sole ground on which the plaintiff's suit has been dismissed.

4. Law relating to limitation in the case of pauper petition examined in the contest of the facts of the case: I will first state the fact which are germane for the purpose of resolving the legal question. Admittedly, the last date for limitation to file the suit was 6-8-1971. There is no dispute that the pauper petition (which is now called petition by indigent) was duly filed by the pauper himself further no dispute that if the Thane Court had jurisdiction to entertain the suit, both the pauper petition as well as the suit would be within limitation. The question of investigation of the indigence of the applicant was taken up by that Court for examination on 26th September 1972 and on that date that Court found that the petition had to be presented to the Court at Alibag. The petition was accordingly filed by the petitioner's learned Advocate in the Court at Alibag immediately on the next day, on 27th September 1972. What was directed to be presented to the proper Court was not the plaint, but the pauper petition. The question of validity of the presentation was considered by the Court along with the question of the petitioner's indigence and the Alibag Court granted the pauper petition. The roznama shows that the pauper petition was not only presented by the petitioner's learned Advocate, Mr. D.V. Khale, but it was even entertained by the Court and the Court directed the petitioner's learned pleader to keep the applicant present in the Court for his statement on 4-10-1972. The applicant (plaintiff) accordingly remained present in the Court on 4-10-1972; his statement was recorded by the learned Judge on that date; notices were ordered to issue to the opponent, which notices were made returnable on 18-11-1972. The respondent's pleader filed their say on 4-1-1973. Notices were also ordered to issue to the District Government Pleader; the District Government Pleader filed his purshis on 20-1-1973,

depositions of the plaintiff were recorded on 29-6-1973 and ultimately after hearing both the sides as well as the District Govt Pleader, the application for suing as indigent was granted and order in that behalf was passed by the Court below the application, Exh. 1, on 29-6-1973. Evidently, the Court regarded this failure on the part of the plaintiff to present the application for declaring him as indigent person, personally, as a mere irregularity. The Court itself granted him time to remain present on 4-10-1972. The relevant portion of Order 33. Rule 3 runs as follows:-

'Order 33, Rule 3:-

3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.'

The above provision clearly shows that the Court has got every power to exempt the personal appearance of the indigent petitioner. The exercise of the power can be done expressly or by necessary implication by giving him time to appear for making statement before the Court on 4-10-1972. The Court implicitly gave to him the facility of exemption from personal appearance so far at the date 27-9-1972 was concerned. The Court went a step further and even declared him to be an indigent person. After having granted this application for leave to sue as an indigent person, the Court had no justification or even jurisdiction to retrace its step and to condemn the petition as being barred by limitation. The view of the learned Judge holding that the suit was barred by limitation deserves to be corrected and set aside on this narrow ground itself.

5. Learned Judge's view relating to good faith and bona fides criticised. The learned Judge has held that the original date of filing of the petition in the Than Court on 5-8-1971 was itself an Act devoid of bona fides & good faith. For coming to this conclusion, the learned Judge has held that the good faith is not claimed by the petitioner and that good faith cannot be inferred otherwise. The learned Judge has observed that-

'There is no evidence on record to show that the plaintiff filed his petition in Thane Court bona fide and in good faith.'

He further observed in para 13 that-

'no averment was made in the petition which was filed in the Alibag Court to the effect that It has been filed in bona fide and good faith in Thane Court and because that Court had no jurisdiction and because that Court had returned the petition on 26th September 1972 that it was filed in the Alibag Court on 27-9-1972.'

According to the learned Judge, all these averments went to the root of the matter so much so that the absence thereof vitiated the filing of the petition in the Alibag Court. the learned Judge has further observed that it was necessary for the plaintiff to change the title of the petition filed in the Alibag Court and to mention the name of the Alibag Court therein. According to the learned Judge, all these acts of omission denote complete absence of good faith and bona fides on the part of the plaintiff. According to him, this showed lack of due care & caution. The learned Judge has further observed in para 13 of his judgment that the plaintiff is a truck owner, that he resides at Kalyan and, hence, was expected to know that Taloja, where the alleged accident took place did not come within the jurisdiction of the Thane Court. The learned Judge has further observed that his Advocate, Mr. Khale, who is a senior Advocate of Thane, was expected to know that Taloja was included in Colaba District and not in Thane itself. On account of all these circumstances, the learned Judge has held that the petition for adjudication of indigence filed in the Thane Court was devoid of any bona fides or good faith.

In my opinion, this is riot of reasoning. In the first place, the learned Judge had no jurisdiction to go into the question all over again when that question had already been decided by the very Court while examining the petition for adjudication of the plaintiff's indigence. The stage for considering whether the petition was barred by limitation or not had already been crossed. As stated above the petition for adjudication of indigence was granted by the Court as early as on 29-6-1973. It is significant to note that the very learned judge who has dismissed the suit on the ground mentioned above had granted the said application. The roznama shows that the proceeding on the application was closed on that date. The suit was

thereafter registered as special civil suit, in view of the order below Exh. 1. On 30-6-1973. Summonses were issued to the defendant afresh, in respect of the suit. The entire question of limitation, thus stood closed on that date. A mere glance at Order 33 Rule 5 is enough to show that the Court's duty bound to reject an application for permission to sue as a pauper where the allegation made by the application in the application shows that on the date of the filing of the pauper petition the suit was barred by any law for the time being in force. This would obviously include the bar of limitation contained in the Limitation Act . When the Court did not exercise the said power under Order 33 Rule 5, what was clearly signified was that the Court had held the application to the Thane Court to be the bona fide application. It clearly meant that the Court had accepted the petitioner's contention that he was entitled to the benefit of Section 14 of the Limitation Act . The entire question had thus been closed on that date, as is ordered by the learned Judge himself, by his order dated 29-6-1973.

But, in my opinion, the view taken by the learned Judge about the absence of good faith and about bona fides cannot be supported even on merits. One cannot say that because the plaintiff, who is just a layman, resided in Kalyan he would be aware that the jurisdiction to file the suit would be vesting in the alibag Court and not the Thane Court, is meaning less on the face of it. The question as to in which Court the suit is to be filed is to be decided by the Advocate of the party; not by the party. There is not even an imputation that the plaintiff is well versed in the provisions and principles of law. There are certain principles of law which are part of the general law relating to justice and every person is expected to know the position. For instance, every person is deemed to know that he cannot go and murder somebody else or cause hurt to anybody else or commit theft of the property of somebody else. Nobody is required to be taught of these provisions of the I.P.C. These laws are the expressions of basic principles of justice and no one can be heard to say that he was not aware of such provisions of law. Nobody can come to the Court and say that he was not aware that he was not to murder somebody else or help himself with the property of somebody else. But the principles of procedural law is not everybody's cup of tea. This position is recognised by all the jurists and this is the main reason why the institution of Advocates exists. This is the reason why the Supreme Court has repeatedly held

that a party should not be penalised for the negligence of his Advocate. I refuse to cite any authority for this purpose, because this rule of law is too deeply entrenched in our corpus juris to need citation of any authority as such. The learned Judge rightly observed that the Advocate for the plaintiff should have known that not the Thane Court but the Alibag Court would be having jurisdiction to entertain the pauper petition. But he was not justified in penalising the plaintiff for his Advocate's fault. One cannot say that because an Advocate committed an error, the Act of the plaintiff of presenting himself in the Thane Court on 5-8-1971 for presentation of the pauper petition was an Act devoid of bona fides or devoid of good faith. One cannot say that he did not Act with due care & caution when he has entrusted the matter to an Advocate, who is recognised even by the learned Judge to be a senior Advocate of the Court. In normal circumstances, this is all that a layman can be expected to do. If he has engaged an Advocate (and a senior Advocate at that) and has reposed trust in him, he cannot be condemned for having failed to exercise due care and caution. In my opinion, the entire view of the learned Judge is basically erroneous.

6. Authorities Examined: Mr. Mohile, the learned Advocate for the appellant, relied upon AIR 1931 Bom 47 Basangauda Shiddangauda v. Secy. Of State) in support of his contention that the view taken by the lower Court as regards limitation was unsustainable.

The facts of that case were that the petition which was presented by the indigent personally in the Court was not signed or verified by him on that date. The Court held that-

'the absence of signature and verification in the first instance does not prevent the petition as presented for being regarded as an application within the explanation to Section 3 of the Limitation Act.'

Mr. Manrekar's reply to this plea was that in that case the petition had been presented personally as is required by Order 33 Rule 3 the Code. According to the Counsel, Order 33 Rule 3 does not state that the petition ceases to be a petition unless it is signed and verified. According to the learned Counsel, even if an unsigned and unverified petition is presented by the petitioner personally in the

Court, the provisions of Order 33 Rule 3 can be said to have been complied with. But, argues the learned Counsel, if the petition is not presented by the petitioner personally, and if he does not obtain the necessary exemption from the Court, then Order 33 Rule 3 cannot be said to have been complied with at all.

I have my doubt about this logic of the above submission of Mr. Mandrekar. It may be difficult to hold that the petition which is neither signed nor verified by the petitioner is 'duly' filed as required by Order 33 Rule 3. If such a petition is held to be 'duly' filed, then there is no reason why a petition filed by the petitioner's duly appointed Advocate should not be treated as 'duly' filed. In my opinion, there is quite some substance in the argument advanced by Mr. Mohile in this behalf. However, I make it clear that I do not want to rest my judgment on the above view. I am prepared to assume, for the purpose of argument, that the petition filed by the learned Advocate for the petitioner cannot be deemed to have been 'duly' filed unless the petitioner had obtained the necessary exemption from the Court as regards his personal appearance. But as observed above, the various facts, which cry hoarse from the record of the case leave no room for doubt that there was an implicit exemption granted by the Court for exemption to the plaintiff from personal appearance.

(A) Mr. Mandrekar referred to the following authorities:-

(i) : AIR 1959 MP402 .

(ii) AIR 1957 Andh Pra 654.

(iii) AIR 1931 Mad 418.

(iv) : AIR1951 Mad841 .

I have gone through the authorities. None of them touches the question which arises in the present case. It appears to be the settled view that the common thread in all the authorities is that all the procedure which is contemplated by Order 33 Rule 3 of the Code, which is followed by the indigent petitioner in the Court of wrong jurisdiction has got to be repeated in the Court where the petition is filed after its return for presentation to the proper Court. there need no quarrel with

the proposition. Point is that in the instant case both in the Thane Court as well as in the Alibag Court, the Court had jurisdiction to grant exemption to the petitioner from making personal presentation of the petitioner. By necessary implication, the Court exercised that power to grant exemption on 27-9-1972 when it directed the petitioner to remain present on 4-10-1972, recorded his statement on that date, accepted the verification on that date, issued notice to the defendants on that date and granted the petition later on.

Having regard to all the above aspects of the matter, the view of the learned Judge about the suit having been barred by limitation cannot be sustained.

7. The conclusion of the lower Court, on appreciation of evidence as regards merits of the case approved & confirmed: so far as the merits of the case are concerned in my opinion, the learned Judges view is quite impeccable. The facts stated above themselves show that the stand taken by the railway administration was a thoroughly unbecoming stand. The Station Master's evidence itself shows that he had made a report to the Divisional Superintendent about the accident. Admittedly that report has not been produced. The learned Judge has rightly raised adverse inference against him on that account. In my opinion, the inference should have been raised much more strongly. The Station Master, Pangare, has admitted that he has given the blame of negligence directly to the Pointsman Sagu Kushaba. In fact he has also stated that it was on account of this negligence that the Pointsman Sagu Kushaba was visited with the penalty of stoppage of 2 year's increment. Curiously enough, an argument was advanced before the learned Judge that there is nothing in the evidence to show that the stoppage of increment of the Pointsman Sagu Kushaba had anything to do with the accident in question. The learned Judge has not doubt negated this contention but not for the reason that the Station Master had himself admitted the ground for stoppage of increment in no uncertain words. In Para 18 of his evidence the Station Master has clearly stated as follows:-

'It is true that in my report made to the Divisional Superintendent I have stated that the alleged accident took place because of the negligence of the Pointsman. It is true that the increment of the Pointsman concerned was stopped for a period of

two years because of the alleged accident.'

In my opinion, it does not behave of the institution such as the Railway Administration to take such a stand in the suit filed by the private aggrieved party, which is indicative of deviation from honesty. The Station Master had himself found that the Pointsman was grossly negligent. He made a report to that effect to the Divisional Superintendent. The Divisional Superintendent must have directed inquiry. In the departmental proceedings that must have followed the Pointsman was even held guilty and was made to suffer penalty. If the pointsman was according to the administration itself found to be negligent in connection with this matter, then it would not lie in the mouth of the administration to contend in this suit that he was not negligent. Litigant such as the railway administration should not stoop to such low as to give protection to the employees whom they themselves have condemned and should not deny to the outside sufferers their lawful dues arising out of negligence of their dues arising out of negligence of their own employees. The railway administration is after all Government Administration. It is a part & parcel of the governmental activity and the Government is expected to be a model litigant, not a cunning litigant, bent on defeating the rightful claims of the people in general.

The Station Master's evidence further shows that he had no grievance against the truck driver at all. That explains why he admittedly filed no complaint against the truck driver.

But the averments made in the written statement and the evidence that was sought to be led show painful departure from pleadings. In the written statement plea was raised that the level crossing was not a manned level crossing. It was further contended that the left wing of the closed gate was forcibly opened by the truck driver, attempting to trespass the railway track disregarding the Railway-s board and the red lamp. In the evidence nothing of this kind is stated. Suggestion was made in the cross-examination of the Level Crossing Gate, which was closed, that the Truck entered the level Crossing after opening the Gate in such a manner. This is ridiculous on the face of it. The evidence sought to be led is that the Pointsman in fact locked the Gate. Admittedly the Level Crossing is on a high

level from the road. Moreover, the Gate is never made of such tiny material that a dash by the truck would open the lock and open the Gate without causing damage to the truck and its inmates. Damage would be caused to the truck ; damage would be caused to the gate also. Nothing of this kind is proved by the defendant all. In fact this plea does not find a place in the written statement at all. In my opinion, the learned Judge has very rightly held that the Act of the railway authorities in not keeping the gate closed and not giving appropriate caution to the truck driver was an Act of gross negligence.

8. Question of quantum of damage. No argument was advanced on either of the sides as regards the view taken by the learned Judge that the damage proved by the plaintiff was to the extent of Rs. 16,200/-.

In my opinion, the evidence has been fully and fairly appreciated by the learned Judge on this point and I see no reason to interfere with the findings arrived at by him.

9. There remains the question of interest and cost:-

RE: Interest & Cost. So far as the question of interest on the sum adjudged is concerned, it needs to be borne in mind that the suits is filed as early as on 05-08-1972. The value of rupee has dwindled down to about 6 annas in a rupee since that date, if not lesser still. Section plaintiff/appellant shall be deducted before the said payment to him.

Liberty is given to the Appellant to move this Court for appropriate orders in this behalf.

10. The Appeal is allowed. The decree of dismissal passed by the lower Court is set aside and the plaintiff is held entitled to recover Rs. 16,200/- from the defendant with interest at the rate of 15% from the date of the suit (27-09-1972) till today and further interest at 6% on the sum of Rs. 16,200/- from today till the date of the deposit of the entire decretal amount in this Court.

The Respondent is directed to deposit this amount in this Court within 6 weeks from today. The Appellant shall not be entitled to withdraw the said amount, except

by furnishing security to the satisfaction of the Registrar of this Court. The appellant, however, shall be entitled to receive the amount without security after the period of filing the Appeal against this judgment is over, or, after the Appeal, if any, is finally disposed of, whichever event occurs earlier.

The Appellant shall be entitled to costs of this Appeal as well as those of the lower Courts.

The Respondent shall also be liable to deposit in this Court the amount of the Court Fee payable by the plaintiff in the trial Court and in the Appeal Court, which amount shall be credited by the office to the payment of the suit and the Appeal.

By this Order, the Appeal stands disposed of.

11. Order accordingly.

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